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Abdul Wahdi bin Zakaria (t/a Sykt Bengkel Setia) v Puspakom Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-332–02 OF 2013
ZAHARAH IBRAHIM, AZIAH ALI AND ANANTHAM KASINATHER JJCA
25 FEBRUARY 2014

Civil Procedure — Striking out — Application to strike out action — Appeal against order allowing striking out application — Whether there was undue delay by defendant in filing its striking out application — Whether limitation period had set in — Whether action should be struck out

Limitation — Pleading — Defence of limitation — Absolute and conditional limitation — Whether limitation should be pleaded in defence — Whether action time barred — Whether plaintiff could bring himself within exceptions set out in Act — Limitation Act 1953

The plaintiff had bought a motorcar, which had been damaged in an accident and classified by the owner as a total loss. The plaintiff had repaired the motorcar and sent it to the defendant for inspection in order for the same to be registered in his name. The defendant's report dated 5 December 2005 ('the first report') stated that the 'cowl panel' of the chassis number of the motorcar had been tampered with. The plaintiff was unable to effect the transfer of ownership of the motorcar to himself as the motorcar was detained by the Road Transport Department. Further inspections of the motorcar were carried out and the defendant issued another report dated 16 March 2010 ('the second report') confirming that the motorcar was approved for registration. Thereafter a change of ownership was effected and the detained car was returned to the plaintiff. On 17 May 2012, the plaintiff filed a claim against the defendant and nine others claiming general damages for negligence but later amended his statement of claim to withdraw his claim against the nine others leaving the defendant as the sole defendant. The plaintiff claimed that the detention of the motorcar was without reasonable grounds. In its statement of defence the defendant denied the plaintiff's claim and further pleaded that it would be applying to strike out the plaintiff's claim pursuant to O 18 r 19 of the Rules of the High Court 1980 ('RHC'). About three months after filing its statement of defence the defendant applied to strike out the plaintiff's statement of claim on the grounds that the claim was statute barred under the Limitation Act 1953 ('the Act'). In opposing the application, the plaintiff contended that the defendant was not entitled to claim limitation since it had not specifically

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pleaded limitation in its statement of defence as required by s 4 of the Act. The plaintiff also submitted that there had been a delay by the defendant in the filing of its striking out application and that its claim was not statute barred pursuant to s 29(c) of the Act because time to file an action only arose from the date of the discovery of the mistake, which was on 16 March 2010. The trial judge found that the respondent had pleaded the defence of limitation in its affidavit in support of the striking out action. The trial judge then allowed the defendant's application to strike out the plaintiff's claim under O 18 r 19 (1) of the RHC on the ground of limitation. Hence the present appeal. In his appeal the plaintiff argued that the trial judge had failed to consider the distinction between absolute limitation and limitation based on the Act, which was a conditional limitation. It was the plaintiff's argument that in cases where an application to strike out was based on limitation under the Act, it had to be specifically pleaded in the statement of defence.

Held, dismissing the plaintiff's claim with costs:

(1) An application under O 18 r 19(1) of the RHC 1980 could be made at any stage of the proceedings. In the present case, the defendant's application was filed approximately three months after the statement of defence was filed. Having considered the circumstances of this case it was clear that there was no merit in the plaintiff's complaint that there was undue delay by the defendant in filing its striking out application (see para 16).

(2) There was also no merit in the plaintiff's submission that time to file an action only arose from the date of the discovery of the mistake, which was on 16 March 2010. There was no averment of any mistake in the first report in the statement of claim or even in the amended statement of claim. In any case, the defendant had valid grounds for failing the motorcar during the first inspection since the cowl panel of the chassis had been tampered with. As such, on the facts as pleaded in the statement of claim there was no mistake in the first report (see paras 17–18).

(3) Further, a cause of action founded in tort accrued when the plaintiff suffered damage and limitation ran from the date on which the cause of action accrued regardless of whether the plaintiff discovered the damage. Thus, s 29 of the Act would not be available to the plaintiff and the plaintiff's cause of action accrued on 5 December 2005. When the plaintiff filed his statement of claim on 17 May 2012, it was clear that limitation had set in and the plaintiff could not bring himself within the exceptions set out in the Act (see paras 18 & 24).

(4) Based on the averments made in the statement of defence, notice had been given to the plaintiff that the defendant intended to show that the plaintiff's claim must fail for being frivolous and vexatious or an abuse of the process of the court. As such, the plaintiff ought not to be taken by

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surprise when the defence was followed by an application to strike out. Instead it was for the plaintiff to show that his claim was not statute barred (see para 23).

[Bahasa Malaysia summary

Plaintif telah membeli sebuah motokar, yang mana telah mengalami kerosakan di dalam kemalangan dan diklasifikasikan oleh pemilik sebagai kerugian penuh. Plaintif telah membaiki motokar dan menghantarnya ke defendan untuk pemeriksaan untuk mtokar didaftarkan atas namanya. Laporan defendan bertarikh 5 Disember 2005 (laporan pertama) menyatakan bahawa 'cowl panel' nombor casis telah diusik. Plaintif tidak dapat membuat pertukaran hak milik motokar itu kepadanya kerana motokar tersebut telah ditahan oleh Jabatan Pengangkutan Jalan. Pemeriksaan lanjut ke atas motokar telah dijalankan dan defendan mengeluarkan satu lagi laporan bertarikh 16 Mac 2010 (laporan kedua) mengesahkan bahawa motokar diluluskan untuk pendaftaran. Selepas itu suatu pertukaran hak milik telah dibuat dan kereta yang ditahan telah dikembalikan kepada plaintif. Pada 17 Mei 2012, plaintif telah memfailkan tuntutan terhadap defendan dan sembilan yang lain menuntut ganti rugi am untuk kecuaian tetapi kemudian meminda pernyataan tuntutannya untuk menarik balik tuntutannya terhadap sembilan yang lain meninggalkan defendan sebagai defendan tunggal. Plaintif mendakwa bahawa penahanan motokar adalah tanpa alasan yang munasabah. Dalam pernyataan pembelaannya defendan menafikan tuntutan plaintif dan selanjutnya merayu bahawa ia akan memohon untuk membatalkan tuntutan plaintif menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 (KMT). Lebih kurang tiga bulan selepas memfailkan pernyataan pembelaannya defendan memohon untuk menolak pernyataan tuntutan atas alasan bahawa tuntutan adalah dihalang statut di bawah Akta Had Masa 1953 ('Akta'). Dalam menentang permohonan, plaintif menegaskan bahawa defendan tidak berhak untuk menuntut atas alasan had masa memandangkan ia tidak secara spesifik dipohon di dalam pernyataan pembelaan seperti yang dikehendaki oleh s 4 Akta. Plaintif juga mengemukakan bahawa terdapat kelewatan oleh defendan dalam pemfailan permohonan pembatalannya dan bahawa tuntutan tidak dihalang statutori menurut s 29(c) Akta kerana masa untuk memfailkan tindakan hanya bermula dari tarikh penemuan kesilapan, yang mana pada 16 Mac 2010. Hakim perbicaraan mendapati bahawa responden telah memohon pembelaan had masa di dalam afidavit dalam menyokong tindakan pembatalan. Hakim perbicaraan kemudiannya membenarkan permohonan defendan untuk membatalkan tuntutan plaintif di bawah A 18 k 19(1) KMT atas alasan had masa. Maka rayuan ini. Dalam rayuannya plaintif berhujah bahawa hakim perbicaraan gagal untuk mempertimbangkan perbezaan antara had masa mutlak dan had masa berdasarkan Akta, yang mana had masa bersyarat. Ia adalah hujahan plaintif bahawa dalam kes-kes apabila suatu permohonan untuk membatalkan adalah berdasarkan had masa di bawah Akta, ia hendaklah diplid secara spesifik di dalam pernyataan pembelaan.

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Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Suatu permohonan di bawah A 18 k 19(1) KMT 1980 boleh dibuat pada mana-mana peringkat di prosiding. Dalam kes ini, permohonan defendan difailkan lebih kurang tiga bulan selepas pernyataan pembelaan difailkan. Mengambil kira keadaan kes ini adalah jelas bahawa tiada merit dalam aduan plaintif bahawa terdapat kelengahan tak wajar oleh defendan dalam memfailkan permohonan untuk membatalkan (lihat perenggan 16).

(2) Juga tidak terdapat merit dalam hujahan plaintif bahawa masa untuk memfailkan tindakan hanya berbangkit dari tarikh penemuan kesilapan, iaitu pada 16 Mac 2010. Tiada penegasan daripada apa-apa kesilapan di dalam laporan pertama dalam pernyataan tuntutan atau walaupun dalam pindaan pernyataan tuntutan. Walau bagaimanapun, defendan mempunyai alasan yang sah kerana menggagalkan motokar sewaktu pemeriksaan pertama memandangkan *cowl panel casis* telah diusik. Oleh itu, seperti fakta yang diplidkan di dalam pernyataan tuntutan tiada kesilapan di dalam laporan pertama (lihat perenggan 17–18).

(3) Seterusnya, kausa tindakan yang berdasarkan tort terakru apabila plaintif menanggung kerosakan dan had masa bermula dari tarikh yang mana kausa tindakan terakru tidak kira sama ada plaintif menemui kerosakan. Oleh itu, s 29 Akta tidak dapat digunapakai plaintif dan kausa tindakan plaintif yang terakru pada 5 Disember 2005. Apabila plaintif memfailkan pernyataan tuntutannya pada 17 Mei 2012, ia adalah jelas bahawa had masa telah ditetapkan dan plaintif tidak boleh meletakkan dirinya dalam pengecualian yang dinyatakan di dalam Akta (lihat perenggan 18 & 24).

(4) Berdasarkan penegasan yang dibuat di dalam pernyataan pembelaan, notis telah diberikan kepada plaintif bahawa defendan bertujuan untuk menunjukkan bahawa tuntutan plaintif mesti gagal kerana remeh dan menyusahkan dan penyalahgunaan proses mahkamah. Oleh itu, plaintif tidak sepatutnya terkejut apabila pembelaan diikuti dengan permohonan untuk membatalkan. Sebaliknya ia adalah untuk plaintif untuk menunjukkan bahawa tuntutannya tidak dihalang oleh statut (lihat perenggan 23).]

Notes

For cases on application to strike out action, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8384–8414.

For cases on defence of limitation, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2417–2418.

Cases referred to

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784, CA (refd)

Riches v Director of Public Prosecutions [1973] 2 All ER 935, FC (refd)

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Tasja Sdn Bhd v Golden Approach Sdn Bhd [2011] 3 CLJ 751, FC (distd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor [2007] 5 MLJ 486, HC (refd)
Yong & Co v Wee Hood Teck Development Corporation [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251; [1984] 1 CLJ 353, FC (refd)

Legislation referred to

Civil Law Act 1956
Limitation Act 1953 ss 4, 6(1)(a), 29, 29(c)
Public Authorities Protection Act 1948
Rules of the High Court 1980 O 18 r 19, O 18 r 19(1), 19(1)(a), (b), (c) (d)

Appeal from: Civil Suit No 21NCVC-103–05 of 2012 (High Court, Kuala Lumpur)

Nor Razmi bin Che Hat (John Yong & Irene Song) for the appellant.
Firdaus Husni (Chooi & Co) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

INTRODUCTION

[1] On 10 December 2012 the High Court allowed the application filed by the respondent to strike out the appellant's claim under O 18 r 19(1) of the Rules of the High Court 1980 on the ground of limitation (encl 29). Being dissatisfied with the decision the appellant appeals to this court. We dismissed the appeal with costs. We now give our reasons below. For the purpose of this judgment we reproduce the salient background facts. The parties will be referred to as they were in the court below.

SALIENT BACKGROUND FACTS

[2] The plaintiff had bought a Proton Wira motorcar bearing registration No WKE4018 the front of which had been damaged in an accident. At the material time the owner of the said motorcar was Oriental Capital Assurance Bhd ('owner'). The owner had classified the motorcar as 'total loss'. The plaintiff repaired the motorcar and then sent it to the defendant for the purpose of inspection in order to enable the motorcar to be registered in the plaintiff's name. This inspection resulted in a report dated 5 December 2005 ('the first report') in which the defendant states that there is tampering with the 'cowl panel' of the chassis number.

[3] The said motorcar was then detained by the Road Transport Department ('RTD') as a result of which the plaintiff could not effect the transfer of ownership to himself. Thereafter a series of inspections were carried

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out. A joint inspection of the motorcar by the car manufacturer Proton, the RTD and the defendant was carried out. On 12 June 2009 Proton issued a report which states that welding marks at the chassis number panel were due to repair works carried out on the motorcar. On 16 March 2010 the defendant issued a 'Laporan Pemeriksaan Khas' ('the second report') confirming that the motorcar was approved for registration. The change of ownership was effected on 22 March 2010. The car which had been detained by the RTD was returned to the plaintiff. The plaintiff is dissatisfied with the detention and loss of use of the motorcar and on 17 May 2012 filed his claim against ten defendants, including the RTD and the defendant herein, claiming general damages amounting to RM253,061.97 for negligence (pp 2–21 of the appeal record). In the statement of claim the defendant is named as the tenth defendant.

[4] In the statement of claim dated 17 May 2012 ('the first statement of claim') the plaintiff claims that the detention of the car by the first to the nineth defendants was without reasonable grounds and that the first to the nineth defendants jointly and severally have failed to justify the detention of the car for five years. The plaintiff further claims that the detention of the car was contrary to the Road Transport Act 1987 and was therefore wrongful and has caused him to suffer losses. As against the defendant/tenth defendant specifically, the plaintiff avers that he has suffered losses as a result of the negligence of the defendant and/or its agents and/or its workers and pleaded the particulars of negligence against the defendant/tenth defendant as follows (p 18 of the appeal record):

(a) *gagal untuk menjalankan pemeriksaan dan analisis yang tepat ke atas kenderaan tersebut*;

(b) *gagal untuk menggunakan kepakaran yang ada dalam menjalankan pemeriksaan ke atas kenderaan tersebut*;

(c) *gagal untuk menyediakan laporan pemeriksaan yang tepat dan betul*;

(d) *secara cuai dan/atau salah mengeluarkan laporan pemeriksaan yang tidak tepat dan/atau salah*;

(e) *secara cuai dalam menjalankan tugas untuk menyediakan laporan pemeriksaan yang tepat kepada orang awam dan jabatan kerajaan*.

The plaintiff prayed for, inter alia, a declaration that the report made by the defendant dated 5 December 2005 is wrong and invalid.

THE DEFENCE

[5] The defendant filed its statement of defence dated 26 June 2012 (pp 31–35 of the appeal record). The defendant denies the plaintiff's claim and vide para 25 of the statement of defence the defendant further pleaded as follows (p 39 of the appeal record):

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25 The tenth Defendant states that this Defence is filed without prejudice to any application to immediately strike out this action pursuant to Order 18 Rule 19 of the Rules of the High Court 1980.

[6] On 27 September 2012 ie approximately three months after the statement of defence was filed, the defendant filed the application encl 29 under O 18 r 19(1)(a), (b) and/or (d) of the Rules of the High Court 1980 ('the Rules') to strike out the first writ and statement of claim dated 17 May 2012 on the ground of limitation under the Limitation Act 1953 ('the Act').

[7] Thereafter by order of court dated 29 August 2012 the plaintiff amended the statement of claim ('the amended statement of claim'). In the amended statement of claim the plaintiff withdrew his claim against the first nine defendants leaving the defendant as the sole defendant (pp 55–69 of appeal record). The appeal record shows that the amended statement of claim was filed on 11 October 2012. The appeal record does not show that any amended defence has been filed.

THE APPLICATION

[8] In the application the defendant relies on the following grounds:

(a) *bahawa kausa tindakan terhadap defendan Ke-10 adalah berdasarkan pemeriksaan kenderaan pertama ke atas Proton Wira bernombor pendaftaran WKE4018 yang dilakukan pada 5 December 2005*;

(b) *bahawa plaintiff hanya memfailkan tindakan ini pada 17 May 2012*;

(c) *bahawa plaintif oleh itu telah dihalang oleh had masa sepertimana yang diperuntukkan statut untuk memfailkan dan meneruskan tuntutan ini terhadap defendan ke-10*;

(d) *bahawa berdasarkan alasan-alasan yang sebagaimana yang telah dinyatakan di atas, writ saman dan penyata tuntutan plaintif bertarikh 17 may 2012 tidak menzahirkan apa-apa kausa tindakan yang munasabah; dan*

(e) *bahawa berdasarkan alasan-alasan tersebut di atas dan iain-lain afidavit sokongan Mohammed Shukor bin Ismail yang difailkan di sini, tindakan ini sekiranya diteruskan akan menjadi remeh, menyusahkan, dan merupakan penyalahgunaan proses mahkamah yang mulia ini*.

[9] In the affidavit in support of the application the defendant avers as follows (pp 79–80 of the appeal record):

4.

Saya menyatakan bahawa inti pati utama tuntutan Plaintif terhadap

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Defendan Ke-10 adalah bahawa Defendan Ke-10 telah cuai dan/atau gagal dalam menjalankan pemeriksaan dan mengeluarkan laporan pemeriksaan pada 5 December 2005 ke atas kenderaan Proton Wira bernombor pendaftaran WKE4018 ('kenderaan tersebut').

5.

Sebagai lanjutan, saya menyatakan bahawa kesemua dakwaan Plaintif terhadap Defendan Ke-10 adalah berasaskan pemeriksaan kenderaan yang dilakukan pada 5 December 2005 ke atas kenderaan tersebut.

6.

Saya dinasihatkan oleh peguamcara Defendan Ke-10 dan sesungguhnya percaya bahawa tuntutan Plaintif yang difailkan di sini telah melebihi had masa yang diperuntukkan oleh Akta Had Masa 1953 iaitu selama 6 tahun daripada kausa tindakan terakru.

7.

Selanjutnya, saya dinasihatkan oleh peguamcara Defendan Ke-10 dan sesungguhnya percaya bahawa oleh itu, tindakan Plaintif yang difailkan di sini tidak boleh diteruskan kerana telah dihalang oleh had masa sepertimana yang diperuntukkan undang-undang.

[10] In opposing the defendant's application the plaintiff relies on the following grounds:

(a) failure by the defendant to plead the defence of limitation in its statement of defence contrary to s 4 of the Act;

(b) delay by the defendant in filing the application; and

(c) mistake in the defendant's first report was discovered only on 16 March 2010 and pursuant to s 29(c) of the Act time for the purpose of limitation only starts to run from the date of discovery of the mistake.

DECISION OF THE HIGH COURT

[11] On the first issue the learned judge considered s 4 of the Act which states as follows:

> 4 Limitation not to operate as a bar unless specially pleaded
>
> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

In His Lordship's considered view an applicant need not file both a defence pleading limitation and an affidavit pleading the same. Such application has either to be supported by an affidavit pleading the Act or, the defence of limitation has been pleaded in the statement of defence. In the present case His

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Lordship found that the respondent has pleaded the defence under s 6 of the Act in para 6 of the affidavit in support of the application. His Lordship concluded that limitation starts to run from the date of the first report ie 5 December 2005 and since the claim was filed only on 17 May 2012 the plaintiff's claim discloses no reasonable cause of action and on the face of it is obviously unsustainable and is rendered frivolous, vexatious, scandalous and an abuse of process. The application was therefore allowed with costs and the plaintiff's claim was struck off.

[12] On the issue of delay His Lordship disagreed that there was delay by the defendant in filing the application. On the issue of mistake His Lordship found that s 29(c) of the Act does not apply as there is no mistake in the defendant's first report because the cowl panel of the motorcar's chassis number had been tampered with and the defendant's second report does not mean that the defendant had made a mistake in their inspection of the car.

THE APPEAL

[13] Before us learned counsel for the plaintiff Encik Nor Razmi relies on the authority of *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] 3 CLJ 751 and submits that the learned judge has erred in failing to consider the distinction between absolute limitation and limitation based on the Act. Relying on the said authority it is submitted that a defence under the Act is not absolute and in such a case, the defence must be pleaded in the statement of defence. The defendant's failure to plead limitation is therefore not in compliance with s 4 of the Act. Further learned counsel submits that there was delay in filing the application because pleadings had been closed on 2 July 2012 and the court had set down the case for trial. On the issue of mistake it is submitted that the defendant did not challenge the two inspections conducted on the motorcar and the defendant has issued two inconsistent reports. The detention of the car by the RTD which caused losses to the plaintiff was pursuant to the defendant's first report. Thus the plaintiff has prayed for declarations that the defendant's first report is wrong and invalid as this report is inconsistent with the defendant's second report.

[14] Learned counsel for the defendant Encik Firdaus on the other hand submits that the failure to expressly plead limitation in the statement of defence is not fatal in a striking out application because in paras 5 and 6 of the affidavit in support of the application the defendant has clearly stated limitation and the Act as one of the grounds to support its application. It is further submitted that the plaintiff could not be said to be taken wholly by surprise by the application because in para 25 of the statement of defence the defendant has averred that the defence is filed without prejudice to any application to strike out the suit under O 18 r 19 of the RHC 1980. It is submitted that the plaintiff therefore

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has had sufficient notice and ample opportunity to argue why limitation does not apply. Learned counsel submits that on the plaintiff's pleaded case the damage caused and loss allegedly suffered came into existence on 5 December 2005 because the plaintiff has sought for damages for loss of use of the motorcar commencing from 5 December 2005 to 22 March 3010. Therefore the cause of action as pleaded accrues on 5 December 2005 and not 16 March 2010 as contended by the plaintiff.

[15] On the issue of delay learned counsel submits that O 18 r 19(1) states that 'the court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action ...'. Therefore it is submitted that there is no specific time within which an application should be filed. In support learned counsel cites the case of *Terengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor* [2007] 5 MLJ 486. In that case the court found that O 18 r 19 does not indicate any mandatory requirement that a striking out application must be undertaken within a specific time although such application must be made as soon as possible and, the court will not refrain from striking out a statement of claim even after commencement of trial because otherwise the court will waste its time and resources on a plea that is bound to fail. With regard to s 29(c) of the Act learned counsel submits that mistake has not been pleaded in the statement of claim. Learned counsel submits that for the purpose of calculating the statutory limitation period, the date of discovery of the purported damage is immaterial to the date of accrual of the cause of action (*AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784).

DECISION

[16] We propose to deal with the issues of delay and s 29(c) of the Act first. On the issue of delay we have noted earlier that the appeal record shows that the defendant's application was filed approximately three months after the statement of defence was filed. Further we note from the record of appeal at p 55 that the order allowing the plaintiff to amend the statement of claim is dated 29 August 2012, well after 2 July 2012 when pleadings had been closed. An application under O 18 r 19(1) could be made at any stage of the proceedings. Having considered the circumstances of this case, we are of the view that the plaintiffs complaint has no merit. We do not find that there is undue delay by the defendant in filing the application

[17] On the issue of mistake, the plaintiff states the mistake was discovered on 16 March 2010 and therefore s 29(c) of the Act applies. Learned counsel for the defendant submits that mistake has not been pleaded in the statement of claim. In the case of *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251; [1984] 1 CLJ 353 the

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claim was for loss of money lent, and damages. The appellants were the solicitors for the respondents. The respondents pleaded concealed fraud against the appellants in the statement of claim but without particulars. The particulars were given in the amended reply. Syed Agil Barakbah FJ said, inter alia, as follows:

> Further it was contended the allegation of concealed fraud is not properly pleaded and not particularised in the statement of claim but only in the amended reply (p 30 of the record). In this regard we refer to *Halsbury's Laws of England* 4th Edn Vol 28 p 295 para 655 which says that *where concealed fraud or mistake is relied upon as postponing the limitation period, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision*. (Emphasis added.)

We agree with learned counsel for the defendant that there is no averment of any mistake in the first statement of claim or, for that matter, even in the amended statement of claim. The mistake alleged by the plaintiff against the defendant, if any, is clearly in relation to the first report dated 5 December 2005. We agree with the learned judge that there is no mistake because the defendant had valid grounds for failing the motorcar during inspection since the cowl panel of the chassis number had been tampered with. We find that while the defendant merely states 'terdapat penukaran pada bahagian 'cowl panel' nombor casis Kenderaan tersebut', the report by the nineth defendant, the chemist, is specific that there are welding marks surrounding the chassis number and 'the portion of metal piece carrying the original chassis No had been cut away and a piece of foreign metal bearing chassis No PL1C96LNR2B767968 welded in its place is not the original number to the car'. The chemist report thus supports the defendant's first report. On the facts as pleaded in the statement of claim we agree with the learned judge that there is no mistake in the defendant's first report. We find that not only is mistake not pleaded in the statement of claim but s 29 of the Act would not be available to the plaintiff in any event. We agree with learned counsel for the defendant that a cause of action founded in tort accrues when the appellant suffers damage and limitation runs from the date on which a cause of action accrues regardless of whether the plaintiff discovers the damage (*AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*).

[18] We now come to the issue of limitation. The primary objection raised by the plaintiff against the defendant's application to strike out is the failure of the defendant to plead limitation in the statement of defence which counsel for the plaintiff submits is contrary to s 4 of the Act and O 18 r 8(1) of the Rules.

[19] In *Tasja Sdn Bhd v Golden Approach Sdn Bhd*, cited by the plaintiff's learned counsel, the plaintiff's claim therein was premised on a contract. After the plaintiffs statement of claim was served on the defendant, the defendant did not file a statement of defence but filed a summons in chambers to strike out the plaintiffs statement of claim under O 18 r 19(1)(b), (c) or (d) on the ground

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that the plaintiffs claim was statute barred under s 6(1)(a) of the Act. In opposing the application, the plaintiff contended that the defendant was not entitled to claim limitation since the defendant has not filed its defence pleading limitation as required by s 4 of the Act. The deputy registrar allowed the defendant's application and struck out the plaintiffs claim. On appeal to the judge in chambers, the learned judge dismissed the plaintiffs appeal and held that the plaintiffs claim was time barred. In the Court of Appeal, the plaintiff submitted amongst others that the defendant had failed to plead a defence of limitation as no defence had been filed, thus there was non-compliance with s 4 of the Act. The Court of Appeal held that s 4 was not relevant for the purpose of the defendant's application as the defendant was applying to strike out the plaintiffs claim under O 18 r 19 and as such the defendant did not have to file its defence at that stage. Thus both the High Court and the Court of Appeal ruled that in an application for striking out based on limitation under the Act it is not necessary to first file a defence pleading limitation under the Act. The plaintiff then obtained leave to appeal to the Federal Court.

[20] One of the questions posed to the Federal Court was as follows:

> whether a defence of limitation under s 4 of the Limitation Act 1953 must be pleaded before a claim can be dismissed on the ground that it is time-barred.

At the Federal Court learned counsel for the plaintiff raised a distinction between a limitation that is conditional and one which is absolute. It was submitted that in the Public Authorities Protection Act 1948 ('PAPA') and the Civil Law Act 1956 ('CLA') the respective limitation periods stated therein are absolute and therefore it is reasonable in an application where limitation that is absolute is relied upon as a ground for striking out, to waive this plea but not in a claim for limitation under the Limitation Act which is not absolute. The Federal Court agreed and held that in cases where the application to strike out is based on absolute limitation such as under the CLA or the PAPA, an application to strike out should be granted without having to plead such a defence because limitation has set in and there is no room for doubt as to when limitation begins to run. However, where the defence is based on limitation under the Act, an application for striking out should not be allowed until and unless limitation is pleaded based on the explicit words in s 4 of the Act and because the defence of limitation under the Act is not absolute as there are exceptions provided in the Act as well as the option for the defendant to waive this defence. To allow a defendant's application to strike out the plaintiffs case even before such events have occurred and deprive the plaintiff of an opportunity to explain why limitation does not apply would cause injustice to the plaintiff. In his judgment James Foong FCJ said, inter alia, as follows:

> ... we agree with the submission of the plaintiff that in an application for striking out under O 18 r 19(1) RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such application. If it is based on s 2(a) of PAPA or s 7(5) of the Civil Law Act, where the

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period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence. However, in a situation where limitation is not absolute, like in a case under the Limitation Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under s 4 of the Limitation Act.

[21] It is pertinent to note that unlike the present case, *Tasja* is a case where the application to strike out was made after service of the statement of claim and before any defence was filed. Therefore the plaintiff had no prior notice that the defendant would raise the defence of limitation until the application to strike out the claim was filed. It was in the context of that scenario that the issue of absolute and conditional limitation was raised and dealt with by the Federal Court. The case of *Tasja* is authority that where the defence relied on is an absolute defence, the court may strike out the claim even in the absence of a statement of defence. Further, it appears from the judgment of Davies LJ in *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 that was referred to by James Foong FCJ in his judgment that, in such cases, where the defence merely alleged that the statement of claim discloses no reasonable cause of action, such an objection on the ground of limitation can prevail. Davies LJ said as follows:

> I do not want to state definitely that, in a case *where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not*. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail. (Emphasis added.)

[22] In the present case the objection taken by the appellant is because limitation is not specifically pleaded in the statement of defence notwithstanding para 25 of the statement of defence and the reasons given by the defendant in the application and in the affidavit in support. The averments made in the statement of defence and in particular in para 25 shows that notice has been given to the plaintiff that the defendant intends to show that the plaintiffs claim must fail for being frivolous and vexatious or an abuse of the process of the court. We agree with learned counsel for the defendant that the plaintiff ought not to be taken by surprise when the defence was then followed by the application to strike out. It is up to the plaintiff to show that his claim is not statute-barred and ought not to be struck out.

[23] Section 6(1)(a) bars the bringing of an action founded on tort after the expiration of six years from the date on which the cause of action accrued. On the uncontested facts we find that the plaintiff's cause of action accrued on 5 December 2005. The plaintiff filed his statement of claim dated 17 May

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2012 on 23 May 2012 (p 7 of the appeal record). It is clear that limitation has set in and there is nothing before the court to suggest that the plaintiff can bring himself within the exceptions set out in the Act. For the reasons stated we dismissed the appeal with costs.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan

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